Tay Hup Lian v Histyle Sdn Bhd & Anor

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO (MT-1) 22–200 OF 1997
VERNON ONG J
29 APRIL 2010

Contract — Assignment — Assignment of retention sum — Whether developer had right to assign — Whether assignment executed by developer valid — Whether absolute — Whether consent order prevented developer from assigning its interest in retention sum to purchaser — Civil Law Act 1956 s 4(3)

Land Law — Sale of land — Retention sum — Retention of RM500,000 of purchase price (retention sum) by solicitor as stakeholder — Retention sum assigned absolutely to purchaser — Whether assignment valid

On 1 July 1993, the plaintiff purchased 12 units of shop lots in a shopping cum office complex known as Plaza Kluang Baru ('the plaza') from the developer of the complex, Lian Foong Housing Development Sdn Bhd ('LFHD'). On 1 June 1994, the plaintiff executed a sale and purchase agreement ('the SPA') for the sale of the said 12 units of shop lots in the plaza to the first defendant for RM665,280. The solicitors retained RM500,000 of the purchase price ('the retention sum') as stakeholder pursuant to the SPA. According to the terms of the SPA and in particular cl 4 therein, the stakeholder was authorised to release the retention sum to LFHD when the conditions stipulated in the said clause were satisfied. Meanwhile in 1994, when the purchasers of various units of shop lots in the plaza instituted legal proceedings against LFHD and the first defendant ('the 1994 action'), a consent order was recorded whereby it was stated that the first defendant had agreed to withhold the sum of RM500,000. The plaintiff was mentioned as LFHD's nominee in the consent order. LFHD demanded payment of the retention sum from the stakeholder on the grounds that the terms and conditions of cl 4 of the SPA had been satisfied. When the stakeholder defaulted in releasing the said sum, LFHD threatened to sue the plaintiff for it. Consequently when the plaintiff paid LFHD the retention sum, LFHD executed a deed of reassignment ('the assignment') dated 27 February 1996 assigning all its rights in the retention sum absolutely to the plaintiff. The plaintiff has commenced the instant action asserting her rights to the retention sum, which she claimed to be entitled to by virtue of the assignment. The first defendant contended that it was entitled to the retention sum by virtue of the consent order. The first defendant also averred that the plaintiff had repudiated the SPA because, inter alia, she had failed to deliver vacant possession of the 12 units of shop lots in the Plaza to the first defendant and failed to assign the same

to the first defendant free from all encumbrances. The first defendant further submitted that the assignment was invalid because it was made without the first defendant's knowledge or consent. The first defendant in turn counterclaimed for a refund of the purchase price and damages for breach of the SPA by the plaintiff. It was the intervenors' contention that the consent order acted as an estoppel against LFHD and the plaintiff and that the purported assignment was void ab initio because at the time of granting the assignment, LFHD had no rights or interests in the retention money to assign it to the plaintiff. At the close of the trial the first defendant raised two preliminary issues; the first was its contention that the plaintiff's counsel ought to be disqualified from acting for her because he had advised the plaintiff and LFHD on the assignment; the second was that one Lau Hock Choon, the attorney for the plaintiff under a power of attorney ('the plaintiff's attorney') was not a competent witness and that he did not have the locus standi to act as the plaintiff's attorney because the power of attorney he relied upon was not valid. The court in deciding whether the plaintiff, the first defendant or the intervenors had a right to the retention sum of RM500,000 that was held by the stakeholder had to determine whether the plaintiff was LFHD's nominee in the SPA; whether all the conditions for the release of the retention sum had been satisfied; whether the assignment executed by LFHD was a valid assignment; and whether the consent order was binding on LFHD or the plaintiff.

Held, allowing the plaintiff's claim and dismissing the first defendant's counterclaim with costs:

(1) Even if the plaintiff's counsel had advised LFHD, the latter was not a party in the present suit and there was no likelihood of a conflict of interest for the plaintiff's counsel. Further the first defendant's objection to the plaintiff's counsel was only raised in its written submission at the close of the trial. In the circumstances the first preliminary objection was without basis and overruled. With regard to the second preliminary objection as to the competency of the plaintiff's attorney, it was found that the power of attorney relied upon was a valid instrument and that the plaintiff's attorney was duly authorised and competent to testify for and on the plaintiff's behalf (see paras 8–9).

(2) There was no evidence to support the first defendant's contention that the plaintiff acted as LFHD's nominee under the SPA because the plaintiff was referred to as the vendor of the 12 units of shop lots in the SPA. The only indication that the plaintiff was LFHD's nominee was in the consent order but perusing the said consent order it was evident that even though LFHD was referred to as 'defendan pertama' in it he was not a party to the consent order. As such, on the totality of the evidence, it was found that the plaintiff was not acting as LFHD's nominee in the SPA (see para 11).

(3) The solicitor as the stakeholder was under a duty to hold the retention sum of RM500,000 in medio pending the conditions stipulated in cl 4 of the SPA being satisfied. In fact these four conditions were satisfied as was corroborated by the stakeholder's admission in its letter dated 3 November 1995 to the plaintiff's solicitors and in an affidavit affirmed by the stakeholder's representative. Since LFHD was not a party to the SPA for the sale of the said 12 units of shop lots in the plaza to the first defendant, the stakeholder did not hold the retention sum as agent for the plaintiff or the first defendant. The retention sum represented the trust estate that the stakeholder held as trustee for both the plaintiff and the first defendant to be released to LFHD. In the circumstances, the stakeholder was authorised to release the retention sum to LFHD, the beneficiary of the trust estate (see paras 12 & 14–15).

(4) Although it was the first defendant's contention that the plaintiff had not given vacant possession of the 12 units of shop lots, the evidence showed that the first defendant had taken delivery of vacant possession of the same (see para 16).

(5) The assignment in this case was in writing and showed an intention for the assignee/plaintiff to have the benefit of the retention sum. This equitable assignment was later perfected by a notice to the stakeholder, which was in accordance s 4(3) of the Civil Law Act 1956. Consequently the plaintiff held an absolute assignment and was entitled in law to sue in her own name to recover the retention sum. The first defendant's contention that the assignment was not valid because it was made without his knowledge as required by clause 14 of the SPA was unsustainable. This was because cl 14 only applied to parties to the SPA and LFHD, the assignor was not a party to the SPA (see para 20).

(6) In law a consent order constitutes evidence of the contract between the consenting parties. Based on the evidence, it was found that the only parties who consented to the consent order were the first defendant and the 100 plaintiffs in the 1994 action. Although LFHD and the plaintiff were mentioned in the consent order they were not consenting parties to the order and the order was not binding on them. Similarly the stakeholder was not a consenting party to the consent order and not bound by the said order (see para 21).

(7) The first defendant's counterclaim which was premised on the purported termination of the SPA cannot stand. There was also no evidence adduced that the plaintiff had breached the SPA (see para 25).

[Bahasa Malaysia summary

Pada 1 Julai 1993, plaintif membeli 12 unit lot kedai di dalam sebuah kompleks membeli-belah merangkum pejabat dikenali sebagai Plaza Kluang

Baru ('plaza tersebut') daripada pemaju kompleks tersebut, Lian Foong Housing Development Sdn Bhd ('LFHD'). Pada 1 Jun 1994, plaintif memeterai perjanjian jual beli ('PJB') bagi jualan 12 unit lot kedai di dalam plaza tersebut kepada defendan pertama pada harga RM665,280. Peguamcara memegang RM500,000 daripada harga belian ('jumlah tahanan') sebagai pemegang amanah berikutan PJB. Menurut terma-terma SPA dan khususnya klausa 4, pemegang amanah diberikan hak untuk melepaskan jumlah yang dipegang kepada LFHD apabila syarat-syarat yang dinyatakan di dalam klausa tersebut dipenuhi. Sementara itu pada 1994, apabila pembeli-pembeli berbagai unit kedai di dalam plaza tersebut memulakan prosiding undang-undang terhadap LFHD dan defendan pertama ('tindakan 1994'), perintah persetujuan telah direkodkan di mana ia dinyatakan bahawa defendan pertama bersetuju untuk menahan jumlah sebanyak RM500,000. Plaintif dinyatakan sebagai wakil LFHD di dalam perintah persetujuan tersebut. LFHD menuntut bayaran jumlah tahanan daripada pemegang amanah atas alasan bahawa terma-terma dan syarat-syarat klausa 4 SPA telah dipenuhi. Apabila pemegang amanah ingkar melepaskan jumlah tersebut, LFHD mengugut untuk menyaman plaintif untuk jumlah tersebut. Dengan itu apabila plaintif membayar LFHD jumlah tahanan, LFHD menandatangani penyerahhakan (penyerahhakan tersebut) bertarikh 27 Februari 1996 menyerahhakkan kesemua haknya di dalam wang tahanan secara mutlak kepada plaintif. Plaintif telah memulakan tindakan ini menyatakan haknya terhadap jumlah tahanan tersebut, yang dia nyatakan dia berhak terhadapnya berikutan penyerahhakan tersebut. Defendan pertama menghujah bahawa ia berhak terhadap jumlah tahanan berikutan perintah persetujuan. Defendan pertama juga menyatakan bahawa plaintif telah membatalkan PJB kerana, antara lain, dia telah gagal memberikan milikan kosong 12 unit kedai di dalam plaza tersebut kepada defendan pertama dan gagal menyerahhakkan kedai-kedai tersebut kepada defendan pertama bebas daripada kesemua tanggungan. Defendan pertama selanjutnya menghujah bahawa penyerahhakan tersebut adalah tidak sah kerana ia dibuat tanpa pengetahuan atau persetujuan defendan pertama. Defendan pertama dengan itu membuat tuntutan balas untuk pengembalian harga belian dan ganti rugi bagi kemungkiran PJB oleh plaintif. Adalah hujahan pencelah-pencelah bahawa perintah persetujuan adalah sebagai estopel terhadap LFHD dan plaintif dan penyerahhakan yang dikatakan adalah batal ab initio kerana pada masa penyerahhakan, LFHD tidak mempunyai hak atau kepentingan di dalam wang tahanan untuk menyerah haknya kepada plaintif. Di penutup perbicaraan, defendan pertama membangkitkan dua isu awalan; pertama adalah hujahannya bahawa peguam plaintif seharusnya dibatalkan mewakilinya kerana dia telah memberikan nasihat undang-undang kepada plaintif dan LFHD bagi penyerahhakan; kedua adalah bahawa seorang yang bernama Lau Hock Choon, wakil plaintif di bawah surat kuasa wakil ('wakil plaintif') bukan seorang saksi yang kompeten dan bahawa dia tidak mempunyai locus standi untuk bertindak sebagai wakil plaintif kerana surat

kuasa wakil yang disandarkannya tidak sah. Mahkamah di dalam menentukan sama ada plaintif, defendan pertama atau pencelah mempunyai hak terhadap wang tahanan berjumlah RM500,000 yang dipegang oleh pemegang amanah perlu menentukan sama ada plaintif adalah penama LFHD di dalam PJB tersebut; sama ada kesemua syarat-syarat untuk pelepasan wang tahanan telah dipenuhi; sama ada penyerahhakan yang ditandatangani oleh LFHD adalah sah dan sama ada perintah persetujuan mengikat LFHD atau plaintif.

Diputuskan, membenarkan tuntutan plaintif dan menolak tuntutan balas defendan pertama dengan kos:

(1) Walaupun peguam plaintif telah menasihatkan LFHD, LFHD bukanlah pihak kepada guaman ini dan tidak ada kemungkinan wujud konflik kepentingan terhadap peguam plaintif. Selanjutnya bantahan defendan pertama terhadap peguam plaintif hanya dibangkitkan di dalam hujahan bertulisnya di penutup perbicaraan. Di dalam keadaan ini bantahan awalan pertama adalah tanpa asas dan ditolak. Berkaitan dengan bantahan awalan kedua berkenaan dengan kekompetenan wakil plaintif, didapati bahawa surat kuasa wakil yang disandarkan adalah instrumen yang sah dan wakil plaintif diberi kuasa dengan wajar dan kompeten untuk memberikan keterangan untuk dan bagi pihak plaintif (lihat perenggan 8–9).

(2) Tidak ada keterangan untuk menyokong hujahan defendan pertama bahawa plaintif bertindak sebagai penama LFHD di bawah PJB tersebut kerana plaintif telah dirujuk sebagai penjual 12 unit kedai di dalam PJB tersebut. Satu-satunya tanda bahawa plaintif merupakan penama LFHD adalah di dalam perintah persetujuan tetapi meneliti perintah persetujuan tersebut adalah jelas bahawa walaupun LFHD dirujuk sebagai 'defendan pertama' di dalamnya dia bukan pihak kepada perintah persetujuan tersebut. Dengan itu, atas keterangan secara keseluruhan, didapati bahawa plaintif tidak bertindak sebagai penama LFHD di dalam PJB tersebut (lihat perenggan 11).

(3) Peguamcara sebagai pemegang amanah bertanggungjawab memegang jumlah tahanan sebanyak RM500,000 in medio sementara menunggu syarat-syarat yang dinyatakan di dalam klausa 4 PJB dipenuhi. Sebenarnya keempat-empat syarat telah dipenuhi seperti yang disokong oleh pengakuan pemegang amanah di dalam suratnya yang bertarikh 3 November 1995 kepada peguamcara plaintif dan di dalam afidavit yang disahkan oleh wakil pemegang amanah. Oleh sebab LFHD bukan pihak kepada SPA untuk jualan 12 unit kedai di dalam plaza tersebut kepada defendan pertama, pemegang amanah tidak memegang jumlah tahanan sebagai ejen untuk plaintif atau defendan pertama. Jumlah tahanan mewakili harta pusaka amanah yang dipegang oleh pemegang amanah sebagai pemegang amanah bagi

plaintif dan juga defendan pertama untuk dilepaskan kepada LFHD. Dalam keadaan ini, pemegang amanah diberi kuasa untuk melepaskan jumlah tahanan kepada LFHD, benefisiari harta pusaka amanah (lihat perenggan 12 & 14–15).

(4) Walaupun ia adalah hujahan defendan pertama bahawa plaintif tidak memberikan milikan kosong 12 unit lot kedai tersebut, keterangan menunjukkan bahawa defendan pertama telah mengambil milikan kosong kedai tersebut (lihat perenggan 16).

(5) Penyerahhakan di dalam kes ini adalah dalam bentuk bertulis dan menunjukkan niat pada pihak pemberihak/plaintif untuk mengambil faedah jumlah tahanan tersebut. Penyerahhakan berekuiti ini kemudian disempurnakan oleh notis kepada pemegang amanah, yang mematuhi s 4(3) Akta Undang-Undang Sivil 1956. Dengan itu plaintif memegang penyerahhakan mutlak dan berhak dari segi undang-undang untuk menyaman atas namanya sendiri untuk memperoleh jumlah tahanan tersebut. Hujahan defendan pertama bahawa penyerahhakan tidak sah kerana dibuat tanpa pengetahuannya seperti yang diperlukan oleh klausa 14 PJB tidak boleh dikekalkan. Ini adalah kerana klausa 14 hanya beraplikasi kepada pihak-pihak kepada PJB dan LFHD, pemberi hak bukan pihak kepada PJB (lihat perenggan 20).

(6) Dari segi undang-undang sesuatu perintah persetujuan membentuk keterangan kontrak di antara pihak-pihak yang bersetuju. Berdasarkan keterangan, didapati bahawa satu-satunya pihak yang bersetuju kepada perintah persetujuan adalah defendan pertama dan 100 orang plaintif di dalam tindakan 1994 tersebut. Walaupun LFHD dan plaintif dinyatakan di dalam perintah persetujuan mereka bukan pihak yang bersetuju kepada perintah tersebut dan perintah tersebut tidak mengikat mereka. Seperti itu juga pemegang amanah bukan pihak yang bersetuju kepada perintah persetujuan tersebut dan tidak terikat oleh perintah tersebut (lihat perenggan 21).

(7) Tuntutan balas defendan pertama yang diasaskan kepada pembatalan PJB tidak kukuh. Malahan tidak ada keterangan yang dikemukakan bahawa plaintif telah memungkiri PJB (lihat perenggan 25).]

Notes

For cases on assignment in general, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2504–2552.

For cases on sale of land in general, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4037–4602.

Cases referred to

Dr Trilochan Kaur d/o Mohan Singh v The Malaysian Dental Council & Anor [2009] 4 MLJ 244; [2010] 2 CLJ 1037, HC (refd)
Eu Finance Berhad v Lim Yoke Foo [1982] 2 MLJ 37, FC (refd)
Ganapathy Chettiar v Lum Kum Chum & Ors; Meenachi v Lum Kum Chum & Ors [1981] 2 MLJ 145, FC (refd)
Hampden v Walsh [1876] 1 QBD 189, DC (refd)
Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143, FC (refd)
Kuldip Singh & Anor v Lembaga Letrik Negara & Anor [1983] 1 MLJ 256, HC (refd)
Malaysian International Merchant Bankers Bhd v Malaysian Airlines System Bhd [1982] 2 MLJ 59, HC (refd)
MBf Factors Sdn Bhd v Tay Hing Ju (t/a New General Trading) [2002] 5 MLJ 536, HC (refd)
Ooi Siew Yook & Ors v Lim Bar Kee [1987] 2 MLJ 267, HC (refd)
Toh Theam Hock v Kemajuan Perwira Management Corporation Sdn Bhd [1988] 1 MLJ 116, SC (refd)
Tsu Soo Sin v Oei Tjiong Bin & Anor [2008] SGCA 46 [2009] 1 SLR 529, CA (refd)
Wan Salimah bte Wan Jaffar v Mahmood bin Omar (Anim bte Abdul Aziz, intervener) [1998] 5 MLJ 162, HC (refd)

Legislation referred to

Civil Law Act 1956 s 4(3)
Legal Profession (Practice and Etiquette) Rules 1978 rr 3(a), (b)(i), 4, 5
Powers of Attorney Act 1949 s 4

MS Murthi (Chambers of Murthi & Partners) for the plaintiff.
Mohd Mutlee (KY Sim with him) (Nora SW Lam & Associates) for the first defendant.
L Sujata (Lim Kian Ser & Co) for the interveners.

Vernon Ong J:

[1] Tay Hup Lian's ('the plaintiff') claim is to assert her right to the stakeholder money of RM500,000 held by the stakeholder. The first defendant Histyle Sdn Bhd ('Histyle') and the intervener are also claiming the right to the stakeholder money.

BRIEF ACCOUNT OF THE FACTS

[2] Lian Foong Housing Development (M) Sdn Bhd ('Lian Foong') was the developer of the shopping cum office complex known as Plaza Kluang Baru. On 1 July 1993 the plaintiff purchased 12 units of shop lots in Plaza Kluang

Baru from Lian Foong. By a sale and purchase agreement dated 24 August 1993 ('the first SPA') Histyle purchased from Lian Foong the second to fifth floor, hotel lobby and office, plant and equipment all located in Plaza Kluang Baru and a portion of vacant land adjoining Plaza Kluang Baru ('the property') for RM2.5m. By a sale and purchase agreement entered on 1 June 1994 ('the second SPA') the plaintiff sold the said 12 units of shop lots to Histyle for RM665,280. Out of the purchase price of RM665,280 Lai Kee Peng & Associates ('the stakeholders') retained RM500,000 ('the retention sum') as stakeholders pursuant to the SPA. The stakeholders was authorised to release the retention sum to Lian Foong subject to fulfilment of certain conditions stipulated in cl 4 therein.

[3] Meanwhile in 1994 the purchasers of various units of shops in Plaza Kluang Baru instituted legal proceedings at the Johor Bahru High Court under originating summons No 24–164 of 1994 ('the 1994 action') against Lian Foong and Histyle. On 24 October 1994 a consent order ('the consent order') was recorded whereby it was, inter alia, stated that:

> DAN DENGAN PERSETUJUAN ADALAH SELANJUTNYA DIPERINTAHKAN BAHAWA Defendan Kedua dikehendaki menahan jumlah sebanyak RM500,000.00 sahaja (yang merupakan baki harga belian 12 unit kedai terletak di Tingkat Satu Plaza Kluang Baru daripada Tay Hup Lian, seorang namaan Defendan Pertama) untuk kepentingan Plaintif-Plaintif dan kegunaan untuk bayaran kos permohonan keluaran hakmilik strata kepada unit kedai-kedai masing-masing dalam Plaza Kluang Baru bayaran perbelanjaan dan fee jurukur, kos-kos pembaikan kerosakan ke harta bersamaan termasuk ruang jalan, koridos, tangga, tandas, sistem hawa dingin, dinding dan sebagainya...

(Note: In the consent order the designation 'Defendan Pertama' refers to Lian Foong and 'Defendan Kedua' to Histyle).

[4] On 27 February 1996 Lian Foong executed a deed of reassignment ('the assignment') assigning all its rights, title and interest in the retention sum absolutely to the plaintiff.

THE PLAINTIFF'S CASE

[5] Under the SPA the stakeholder is authorised to release the retention sum to Lian Foong under cl 4 of the SPA. All the terms and conditions under cl 4 have been duly satisfied. Lian Foong became lawfully vested of the retention sum and demanded payment of the retention sum from the stakeholders. When the stakeholder defaulted in releasing the said sum, Lian Foong thereafter threatened to sue the plaintiff for it. Consequently the plaintiff paid Liang Foong RM500,000. Lian Foong executed the assignment after receipt of the said sum. The plaintiff is entitled to the retention sum by virtue of the

assignment. The consent order is only an agreement between Histyle and the second defendant. The plaintiff not being a party is not bound by the consent order; further the plaintiff is not entitled to set aside the consent order (*Ganapathy Chettiar v Lum Kum Chum & Ors; Meenachi v Lum Kum Chum & Ors* [1981] 2 MLJ 145 (FC)). Insofar as the plaintiff is concerned, the consent order is a nullity and does not bind her at all (*Eu Finance Berhad v Lim Yoke Foo* [1982] 2 MLJ 37 (FC)). Histyle has no interest in the retention money. The assignment of the retention sum by Lian Foong to the plaintiff is an equitable assignment (*Malaysian International Merchant Bankers Bhd v Malaysian Airlines System Bhd* [1982] 2 MLJ 59; *Tsu Soo Sin v Oei Tjiong Bin & Anor [2008] SGCA 46* [2009] 1 SLR 529; s 4(3) of the Civil Law Act 1956; *MBf Factors Sdn Bhd v Tay Hing Ju (t/a New General Trading)* [2002] 5 MLJ 536).

HISTYLE'S CASE AND COUNTERCLAIM

[6] Histyle contends that they are entitled to the retention sum by virtue of the consent order. Further the plaintiff has repudiated the second SPA because (i) the plaintiff failed to assign the 12 units of shop lots to Histyle free from all encumbrances, (ii) the plaintiff failed to deliver vacant possession of the 12 units of shop lots to Histyle, (iii) Lian Foong failed to transfer the property to Histyle free from all encumbrances, (iv) Lian Foong failed to remove the caveats, and (v) Lian Foong failed to apply for subdivision of the property. The assignment is invalid as it was made without Histyle's knowledge or consent. By way of counterclaim Histyle is claiming for a refund of the purchase price and damages for breach of the second SPA by the plaintiff.

INTERVENERS' CASE

[7] Lian Foong was a party in the 1994 action and has full knowledge of the consent order. Even though the plaintiff is named as Lian Foong's nominee in the consent order Lian Foong did not take any steps to set aside, vary review or appeal against the consent order (*Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 (FC); *Ooi Siew Yook & Ors v Lim Bar Kee* [1987] 2 MLJ 267). Instead Lian Foong and or the plaintiff chose to circumvent the consent order by claiming that Lian Foong assigned their right to the retention sum. The consent order acts as an estoppel against Lian Foong and the plaintiff (*Ganapathy Chettiar v Lum Kum Chum & Ors; Meenachi v Lum Kum Chum & Ors*). At the time of the granting of the assignment on 27 February 1996 Lian Foong had no rights or interests in the retention money to assign it to the plaintiff. The purported assignment is void ab initio.

FINDINGS OF THE COURT

[8] At the outset the court will deal with two preliminary issues. The first

relates to Histyle's contention that Dato MS Murthi ('DMSM') ought to have been disqualified as counsel for the plaintiff. Histyle contends that as the assignment and the power of attorney (exh P2) was prepared by DMSM's legal firm DMSM ought not to act for the plaintiff (rr 3(a)(b)(i), 4 and 5 of the Legal Profession (Practice and Etiquette) Rules 1978; *Dr Trilochan Kaur d/o Mohan Singh v The Malaysian Dental Council & Anor* [2009] 4 MLJ 244; [2010] 2 CLJ 1037). DMSM was not called as a witness at the trial. Even if DMSM had advised the plaintiff and Lian Foong on the assignment, Lian Foong is not a party in the present suit. There is no likelihood of any conflict of interest for DMSM. Furthermore, at no time during the pre-trial conference or during the course of the trial did the first defendant object to DMSM as counsel for the plaintiff or intimate that DMSM was a potential witness. This issue was only raised by the first defendant in its written submission after the conclusion of the trial. The court finds that the first defendant's contention is without basis and the preliminary objection is overruled.

[9] The second preliminary issue relates to the locus standi and competency of Lau Hock Choon ('PW1') as a witness for the plaintiff. PW1 testified as the attorney for the plaintiff under a power of attorney dated 10 July 2008 ('P2'). Both the first defendant and the interveners contended that P2 is not valid for being not registered under s 4 of the Powers of Attorney Act 1949 (*Halsbury's Laws of Malaysia* Vol 23; *Wan Salimah bte Wan Jaffar v Mahmood bin Omar (Anim bte Abdul Aziz, intervener)* [1998] 5 MLJ 162). The PA was attested and authenticated by one Soh Ah Kan a commissioner for oaths on 10 July 2008; it was subsequently registered at the Kuala Lumpur High Court. The PA also bears the seal of the High Court and is endorsed as follows — 'No Pendaftaran 45115/08. Salinan Pendua disimpan Di Mahkamah Tinggi Kuala Lumpur Pada 22 Jul 2008. Dibandingkan dengan asal'. The PA marked as exh P2 is a true copy of the original PA as evidenced by the endorsement of the senior assistant registrar. The court is satisfied that the PA is a valid instrument and that PW1 is duly authorised and competent to testify for and on behalf of the plaintiff as her attorney.

[10] The question of whether the plaintiff is entitled to the relief sought will be considered by reference to the following issues:

(a) Whether the plaintiff was acting as the developer's nominee when she entered into the second SPA?

(b) Whether the retention sum was held by Lai Kee Peng as stakeholders, and if so, on what terms?

(c) Whether the second SPA has been terminated?

(d) Whether the assignment is valid?

(e) Whether the consent order is binding on the stakeholders?

Whether the plaintiff was acting as the developer's nominee when she entered into the second SPA?

[11] A nominee is defined as (i) a person or group of people, not the owners in whose name a stock or registered bond certificate or a company registered (*The New Shorter Oxford English Dictionary on Historical Principles* Vol 2); (ii) one designated to act for another as his representative in a rather limited sense, sometimes used to signify an agent or trustee (*Black's Law Dictionary* (5th Ed)). There is no evidence to support the first defendant's contention that the plaintiff acted as Lian Foong's nominee under the second SPA. In the second SPA the plaintiff is described simply as the vendor. In fact by a letter dated 19 December 1995 from the first defendant to the plaintiff's solicitors, the first defendant implicitly recognised the plaintiff as the lawful vendor under the second SPA and who assigned the proceeds of sale to Lian Foong. Further in a letter dated 13 July 1996 Lian Foong notified the stakeholders that they are not the vendors of the 12 units of shop lots under the second SPA. The only indication that the plaintiff is a nominee of Lian Foong is in the consent order which recorded, inter alia, that the plaintiff 'Tay Hup Lian, seorang namaan defendan pertama'. Perusing the consent order, it is evident that even though Lian Foong is the 'defendan pertama' Lian Foong is not a party to the consent order. This finding is also borne out by the last sentence of the consent order which stipulates that the order 'akan mengikat pemegang serahhak namaan, likuidator dan penerima bagi segala pihak-pihak plaintiff-plaintiff dan defendan kedua'. On the totality of the evidence, the court finds that the plaintiff was not acting as Lian Foong's nominee in the second SPA.

Whether the retention sum was held by Lai Kee Peng & Associates as stakeholders, and if so, on what terms?

[12] The word 'stake' is generally used to apply to any money to be disposed of in accordance with the occurrence of a future event; and the party in possession of the money is often described as a stakeholder. How the money is to be disposed of depends on the terms on which it is held (see *Halsbury's Laws of Malaysia* para 420.020). A stakeholder is defined as a person who receives money and holds it *in medio* pending the outcome of a future event (*Kuldip Singh & Anor v Lembaga Letrik Negara & Anor* [1983] 1 MLJ 256). Generally a stakeholder is duty bound to hold the money as trustee for both parties to await that event and until that event is known, it is his duty to keep it in his own hands (*Hampden v Walsh* [1876] 1 QBD 189). What is in essence stakeholding has been stated succinctly in *Toh Theam Hock v Kemajuan Perwira Management Corps Sdn Bhd* [1988] 1 MLJ 116 (SC) at p 118 where Hashim Yeop A Sani SCJ (as he then was) said:

What is in essence stakeholding? The word stake is in common parlance used to apply to any money to be disposed of in accordance with what may happen in future; and whoever is in possession of the money is often described as a stakeholder. The manner in which money is disposed of depends on the terms on which it is held.

In sale and purchase agreement cases the position is put clearly by Lord Edmund-Davies in *Sorrell v Finch* who repeated what was said in *Maloney v Hardy*:

> The essence of stakeholding in vendor and purchaser cases is that a binding contract of sale has been entered into and the intended purchaser deposits with a third party to be held pending completion; meanwhile the third party holding that deposit may part with it to neither contracting party without the consent of the other ...

In any particular case of sale and purchase, whether a person receiving the deposit is to be considered as an agent for the vendor or for the purchaser or for both as principal or as trustee is a question of law depending on the circumstances of the transaction as a whole. The learned judge concluded that in that case the appellant received the deposit as agent for the respondent in a fiduciary capacity and therefore on general principles he would be accountable.

In *Burt v Claude Cousins & Co Ltd* Lord Denning MR in his dissenting judgment explained the liability of an estate agent or solicitor receiving a deposit as a stakeholder which statement of the law was accepted by the House of Lords in *Sorrell v Finch*. He said:

> If an estate agent or solicitor, being duly authorised in that behalf, receives a deposit 'as stakeholder', he is under a duty to hold it in medio pending the outcome of a future event. He does not hold it as agent for the vendor, nor as agent for the purchaser. He holds it as trustee for both to await the event: see *Skinner v Trustee if Property of Reed* [1967] 2 All ER 1286 at p 1289, Cross J. Until the event is known, it is his duty to keep it in his own hands; or to put it on deposit at the bank; in which case he is entitled to keep for himself any interest that accrues to it; see *Harrington v Hogart* (1830) 1 B & Ad 577, If the purchaser should become entitled to the return of his deposit, he must sue the estate agent or solicitor for it: see *Eltham v Kingsman* (1818) 1 B & Ad 683 and *Hampton v Walsh* [1976] 1 QBD 189. He cannot sue the vendor, because the vendor has never received it, or becomes entitled to receive it.

Pennycuik VC in *Potters v Loppert* at p 661 considered the law in relation to contract deposits. Where money is placed in medio in the hands of a third party to await an event as between two parties the third party receives that property as trustee and that property and the investments for the time being representing it represent his trust estate. Certainly the money may be paid to the third party as trustee, but equally it may be paid to him as principal on a contractual or quasi-contractual obligation to pay the like sum to one or other of the parties according to the event. It must depend

A on the intention of the parties, to be derived from all the circumstances, including any written documents, in which capacity the third party receives the money.

[13] It is not disputed that the stakeholders is authorised under the second SPA to release the retention sum to Lian Foong after four conditions stipulated in cl 4 are satisfied; briefly, the conditions are as follows:

B

(a) the issue document of title to the land held under HS(D) 3411 PTD 8377 ('the land') is registered in favour of Histyle;

C (b) the plaintiff executing all relevant documents for the assignment of the rights interest and title to the 12 units of shop lots in favour of Histyle;

(c) all the existing caveats on the land are removed; and

D (d) delivery of the original copy of the first principal agreement to Histyle.

[14] Histyle contends that the conditions have not been satisfied. Firstly, DW1 said that one existing caveat have not been removed. This caveat was lodged on 11 June 2004; it post-dated the second SPA dated 1 June 1994. As E this caveat is not an existing caveat DW1's contention is without merit. Secondly, Histyle contended that the plaintiff has not given vacant possession of the 12 units of shop lots. Under cross-examination, however, DW1 admitted that he had received vacant possession of the shop lots but he is actually asking for vacant possession free from encumbrances. Histyle's F contention on this issue is misconceived and unfounded. Thirdly, DW1 said that Lian Foong did not transfer the land free from encumbrances. This is also without basis as the land has been transferred to Histyle. Fourthly, it is contended that Lian Foong did not remove the caveat. This contention is also misconceived as all the existing caveats have been removed. Lastly, Histyle G complained that there are no strata titles for the units in Plaza Kluang Baru. As this is not a condition precedent for the release of the retention sum the compliant is not relevant. The fact that all the aforesaid conditions were satisfied is corroborated by (i) the stakeholder's admission in its letter dated 3 November 1995 in reply to the plaintiff's solicitors, and (ii) in Lai Kee Peng's H affidavit (exh P5) affirmed on 2 July 1996 wherein at para 5 it is stated 'Terma-terma dan syarat-syarat dalam fasal 4 tersebut telahpun dilaksanakan dan dipenuhi'.

[15] Since Lian Foong is not a party to the second SPA the stakeholder does I not hold the retention sum as agent for the plaintiff nor as agent for Histyle. The retention sum therefore represents the trust estate that the stakeholder holds as trustee for both to release the retention sum to Lian Foong. In the circumstances the stakeholder is authorised to release the retention sum to Lian Foong the beneficiary of the trust estate.

Whether the second SPA has been terminated?

[16] DW1 contended that the second SPA has been terminated. In cross-examination DW1 said that Histyle's lawyer terminated the second SPA but he could not produce any document to substantiate his statement. There is in fact no evidence to show that Histyle terminated the second SPA. On the other hand the evidence shows that Histyle has taken delivery of vacant possession of the 12 shop lots. The land has also been transferred to Histyle by Lian Foong and all the existing caveats have been removed. At all material times the stakeholders was acting for Histyle in the second SPA and the stakeholders have confirmed that all the conditions for the release of the retention sum have been fully satisfied. In the circumstances DW1's contention is not only a bare assertion but flies in the face of the evidence. In addition Histyle did not plead that the second SPA has been terminated. In the premises the question is answered in the negative.

Whether the assignment is valid?

[17] Is the assignment an equitable assignment? The nature and character of an equitable assignment was described in *Malaysian International Merchant Bankers Bhd v Malaysian Airlines System Bhd* [1982] 2 MLJ 59 where the plaintiff sued the defendant as assignee of a debt due from the defendant to Bahagia Trading Sdn Bhd in respect of certain contracts made between Bahagia and the defendant. Bahagia had agreed to assign and transfer absolutely to the plaintiff the whole of the moneys due and payable to it from the defendant under the said contracts as a consideration of and a further collateral security for a loan of RM400,000 granted to it by the plaintiff. As assignment deed was executed by the plaintiff and forwarded to the defendant who signed it. The deed had not been signed by Bahagia but was signed later. The issue was whether there was an equitable assignment and if so whether it was effective before the defendant made the payments to Bahagia. Mohamed Azmi J (as he then was) held that the plaintiff could not have succeeded if it were to prove its claim under legal assignment as no statutory notice was given to the defendant as stakeholder under s 4(3) of the Civil Law Act 1956. At p 60 Mohamed Azmi J said:

> On agreed issues of law, in equitable assignment, no particular form of words is required. The only thing that is necessary is to make the meaning plain. The words must clearly show *an intention that the assignee* (in this case MIMB) *is to have the benefit of the chose in action*. The assignment may be addressed *either* to the debtor (in this case MAS) or to the assignee, (see *Halsbury's Laws of England* (4th Ed) Vol 6 para 30). In short, there must be a clear intention on the part of Bahagia/assignor that MIMB is to have the moneys due from MAS, under the contract between Bahagia and MAS. Bahagia must address the assignment either to MAS or MIMB. As between the assignor and the assignee, an equitable assignment, whether voluntary

A or for value, is absolute and complete without notice been given to the debtor or fundholder (see para 41 of *Halsbury*'s). But, a debtor or fundholder who has received notice of an equitable assignment must withhold all further payments to the assignor unless made with the consent of the assignee, for if he pays to the assignor without such consent, he will have to pay over again to the assignee. After notice, the debtor or fundholder becomes trustee for the assignee.

B

[18] A chose in action is defined as a thing of which a person who has not the present enjoyment, but merely a right to recover it (if withheld) by action (*Mozley & Whiteley's Law Dictionary*, (10th Ed). In this case the chose in action is the retention sum. The conditions of a valid deed of assignment are succinctly enunciated by Jeffrey Tan J (as he then was) in *MBf Factors Sdn Bhd v Tay Hing Ju (t/a New General Trading)* [2002] 5 MLJ 536. In this connection it is also useful to note the comments in *Tsu Soo Sin v Oei Tjiong Bin & Anor [2008] SGCA 46*, where the Singapore Court of Appeal said at p 539:

C

D

> There appear to be three settled requirements for an effective equitable assignment (see *Phelps v Spon-Smith & Company* [2001] BPIR 326 at paras [39]–[41]):
>
> (a) an intention to assign;
>
> E
>
> (b) clear identification of the chose being assigned; and
>
> (c) some act by the assignor showing that he is passing the chose in action to the alleged assignee.
>
> F
>
> The list accords with the essential features of such assignment discussed in *Snell's Equity* (John McGhee gen ed) (*Sweet & Maxwell* (31st Ed), 2005) at paras 3–13 to 3–19 summarised as follows:
>
> (a) No particular form of assignment is required.
>
> (b) Mandate or authority is not enough; there must be some transaction sufficiently manifesting an intention to assign.
>
> G
>
> (c) The assignment must sufficiently identify the chose being assigned.
>
> (d) Notice to the assignee may be required depending on the form of assignment in question. An assignment made by a direction given by the assignor to the debtor appears not to be binding without notice to the assignee, while an assignment by a direct transfer to the assignee is effective even if the assignee is unaware of it.
>
> H
>
> (e) Writing is sometimes required.
>
> (f) Value is sometimes required.
>
> I
>
> (g) Notice to the debtor is not essential but desirable.

[19] In short the three conditions of a valid assignment are that (i) the assignment must be absolute and not purport to be by way of charge only, (ii)

it must be in writing under the hand of the assignor, and (iii) express notice in writing thereof must be given to the debtor or trustee. The principal clause in the assignment states:

> 1. In consideration of the premises as set out hereinbefore, the Reassignor (Lian Foong) hereby *assigns absolutely and without recourse*, to the Original Beneficiary (the plaintiff) *all rights, title and interest in and to the amount of the Principal sum of RM500,000.00 and any interest thereon, deposited in the Client's Account of Lai Kee Peng & Associates*, Advocates & Solicitors, No. 33 Jalan Segget, 80000 Johore Bahru being the balance purchase price payable to the Reassignor by the Purchaser Histyle Sdn Bhd under the Sale And Purchase Agreement dated 1st June 1994. (Emphasis added.)

[20] In this case the assignment is in writing and is under the hand of the assignor Lian Foong. It shows an intention that the assignee (in this case the plaintiff) is to have the benefit of the retention sum absolutely. The assignment is an equitable assignment. It was perfected after notice of the assignment has been given to the stakeholders under letter dated 9 April 1996 in accordance with s 4(3) of the Civil Law Act. Consequently the plaintiff holds an absolute assignment. As a result the legal right to the retention sum including all legal and other remedies for the recovery of the retention sum has been passed and transferred to the plaintiff with effect from the date of the notice. The plaintiff is therefore entitled in law to sue in her own name to recover the retention sum. Histyle contends that the assignment is not valid because it was made without Histyle's knowledge or consent as required by cl 14 of the second SPA is unsustainable. Clause 14 only applies to the parties under the second SPA, namely the plaintiff and Histyle. The plaintiff did not assign any right or interest in the second SPA to any person. The assignment was made by Lian Foong. As Lian Foong is not a party in the second SPA, the restriction in cl 14 does not apply to Lian Foong. For the foregoing reasons the court finds that the assignment is valid.

Whether the consent order is binding on the stakeholders?

[21] There are two components to this question. The first component relates to whether the consent order binds Liang Foong and or the plaintiff. The consent order was recorded in the 1994 action in which Lian Foong and Histyle were sued by 100 purchasers of shop lots in Plaza Kluang Baru from Lian Foong. According to the consent order the parties present were 'dalam kehadiran Cik Julie Lim peguambela bagi plaintiff-plaintiff dan menyebut bagi pihak peguambela bagi defendan kedua'. There is nothing in the consent order to say that Lian Foong was present or that someone mentioned on behalf of Lian Foong's solicitors. In law a consent order constitutes evidence of the contract between the consenting parties. It is binding on all the consenting parties and it may be pleaded as an estoppel (see *Ganapathy Chettiar v Lum*

Kum Chum & Ors; Meenachi v Lum Kum Chum & Ors). On the evidence the court finds that the only parties who consented to the consent order are Histyle and the 100 plaintiffs in the 1994 action. Notwithstanding that Lian Foong is the first defendant therein, it is clear that Lian Foong is not a consenting party to the consent order. In the same manner, the fact that the plaintiff is mentioned in the consent order as Lian Foong's nominee does not of itself make the plaintiff a consenting party to the consent order. As Lian Foong and the plaintiff are not consenting parties to the consent order, Lian Foong and the plaintiff are not bound by the consent order; in consequence the consent order may not be pleaded as an estoppel against Lian Foong or the plaintiff. In short the consent order is not binding on Lian Foong and or the plaintiff.

[22] The second aspect relates to whether the consent order is binding on the stakeholders. There is also nothing in the consent order to indicate that the stakeholder is a consenting party. That the consent order is only binding on Histyle and the 100 plaintiffs in the 1994 action is evident from the wordings of the last sentence of the consent order as follows:

DAN DENGAN PERSETUJUAN JUGA ADALAH DIPERINTAHKAN BAHAWA

> Perintah Persetujuan ini akan mengikat pemegang serahhak namaan, likuidator dan penerima bagi segala pihak-pihak Plaintif-Plaintif dan Defendan Kedua.

[23] In the premises the consent order is not binding on the stakeholders. In law the effect of the consent order is that Histyle had agreed to withhold the sum of RM500,000. As Histyle had taken it upon itself to fulfil the obligations set out in the consent order, Histyle is answerable to the 100 plaintiffs in the 1994 action. Neither Lian Foong nor the stakeholders are bound by the consent order. For the foregoing reasons the question is answered in the negative.

[24] In conclusion, the court finds that the plaintiff is not Lian Foong's nominee in the second SPA. All the conditions for the release of the retention sum have been satisfied. The plaintiff did not commit any breach of the second SPA. Histyle has taken vacant possession of the 12 units of shop lots and the second SPA has not been terminated. The consent order is not binding on Lian Foong and or the plaintiff. The assignment is a valid assignment of the retention sum from Lian Foong to the plaintiff. Pursuant to the assignment the plaintiff is possessed of the full legal rights to the retention sum. Accordingly the plaintiff's claim is allowed in prayers (a) and (b). It is also ordered that in the event that Histyle is in possession of the retention sum, Histyle pay over the same to the stakeholders within 14 days of this order.

[25] Turning now to Histyle's counterclaim which is premised on the purported termination of the second SPA. Firstly, it is not pleaded that Histyle terminated the second SPA. There is no evidence to show that the plaintiff had breached the second SPA. There is also no evidence to show that Histyle has terminated the second SPA. DW1's evidence that his lawyer terminated the second SPA is not corroborated. In the premises it must be taken that the second SPA has not been terminated and Histyle has affirmed the second SPA. Accordingly, Histyle has no cause of action against the plaintiff. For the foregoing reasons Histyle's counterclaim is dismissed with costs.

Plaintiff's claim allowed and first defendant's counterclaim dismissed with costs.

Reported by Kohila Nesan